Supreme Court, U.S.
FILED
APR 16 2001
OFFICE OF THE CLERK

No. 00-1293

In The
Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,

PETITIONER,

v.

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,

RESPONDENTS.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE

NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES,

IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Law Center for Children and Families[1] ("NLC") is a law enforcement support organization which provides advice, training, legal research, briefs, and trial and appellate assistance to federal, state, and local prosecutors and police agencies throughout the United States and in several foreign countries, as well as to Congress and other legislative and administrative bodies. NLC specializes in legal and law enforcement issues related to obscenity, child pornography, unlawful sexual exploitation and abuse, the broadcasting of indecent material, and the display and dissemination of materials that are harmful to minors. NLC and its Chief Counsel have participated in numerous *amicus curiae* briefs before this Court and other federal and state appellate and trial courts on these issues. Counsel of Record provided testimony and advice to Congress on the Child Online Protection Act (COPA) and filed briefs for Members of Congress as *amici curiae* in the District Court and in the Third Circuit below. NLC submits that the decisions below are contrary to this Court's precedent and submits an argument not likely to be submitted by the parties.

CONSENT TO FILE BRIEF

Petitioner and Respondents, through their counsel of record respectively, have granted consent to the filing of this Brief *Amicus Curiae* in support of the Petition. Their letters of consent are on file with the Clerk of the Court.

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[1] This Brief *Amicus Curiae* was authored in whole by Counsel of Record Bruce A. Taylor of the National Law Center for Children and Families, an educational organization under IRS § 501(c)(3), and no part of the brief was authored by any attorney for a party. No person or entity other than *amicus curiae*, its members, or counsel, made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

SUMMARY OF ARGUMENT

The Court of Appeals was clearly in error in its refusal to narrowly construe the Child Online Protection Act's definition of "harmful to minors," 47 U.S.C. § 231 (e)(6), within a constitutionally valid scope and lend the necessary authoritative construction intended by Congress as a limitation on the test for what is "obscene for minors" to a constitutionally valid, non-geographic "adult" *age* community standard, rather than an unconstitutionally territorial *geographic* community standard. *ACLU v. Reno*, 217 F.3d 162, 173-78 (3d Cir. 2000), *reh. denied* (2000). Congress enacted COPA with specific recognition of this Court's mandate that the application of obscenity-related tests for separating pornography that may be regulated from First Amendment protected speech is dependent on the medium. The Congressional intent expressed in its REPORT OF THE HOUSE COMMITTEE ON COMMERCE, H.R. Rep. No. 105-775, at 28 (1998), was that COPA was to be adapted to the World Wide Web by using a "new" standard of what the American adult-age community as a whole would find prurient and offensive for minors in the probable recipient age group. The Third Circuit refused to adopt this Congressionally intended customization of the "harmful to minors" test and, by such refusal, interpreted the Act in an unconstitutional fashion. 217 F.3d at 178. By doing so, that Court, as had the District Court below, failed in its duty to properly construe this federal statute so as to save it for valid application within constitutional boundaries.

For this reason alone, this Court should grant the Petition, reverse the decision of the Court of Appeals, and remand the cause to the Third Circuit for a narrowing authoritative construction to guide the District Court in the trial on the merits of this case.

ARGUMENT

The Court of Appeals focused solely on the "'contemporary community standards' aspect of COPA" in "affirming the District Court's ruling on a ground other than that emphasized by the District Court". 217 F.3d at 174, n. 19. As stated by the Court of Appeals, at 173-74:

> We base our particular determination of COPA's likely unconstitutionality, however, on COPA's reliance on "contemporary community standards" in the context of the electronic medium of the Web to identify material that is harmful to minors. The overbreadth of COPA's definition of "harmful to minors" applying a "contemporary community standards" clause—although virtually ignored by the parties and the amicus in their respective briefs but raised by us at oral argument—so concerns us that we are persuaded that this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute.

Although later discussing the arguments raised by the Government and the Congressional *amici* on this issue, the Court of Appeals rejected the Congressional intent to apply the Committee Report's statutory directive to create a "new harmful to minors definition" that was "crafted in a way to respond to the Supreme Court's concerns" in *Reno v. ACLU*, 521 U.S. 844 (1997). *See* H.R. Rep. No. 105-775, p. 13.

Congress specifically explained its intent to apply a medium-specific, non-geographic standard to the first two prongs of the test for what is "obscene for minors" or "harmful to minors" and the courts below failed in their duty to follow the requirements for federal court review of federal statutes expressed in *New York v. Ferber*, 458 U.S. 747, 769,

n. 24 (1982) ("When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction."), and *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (context is all important, including the medium involved).

This issue was discussed at pp. 16-17 of the BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* that was filed with the Third Circuit:

> This Court, like the Supreme Court in *Ferber*, should correct the assumption that federal courts can "widen the possibly invalid reach of the statute by giving an expansive construction" to COPA and apply the clearly binding precedents discussed herein and in the COMMITTEE REPORT.
>
> Courts recognize the need to follow these principles in applying the HTM test to pornographic treatments, rather than to ideas or messages in controversial works, as in the school cases: *Board of Education v. Pico*, 457 U.S. 853 (1982); *Bicknell v. Vergennes Union High School Board of Directors*, 638 F.2d 438 (2d Cir. 1980); *Presidents Council v. Community School Board*, 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972).

COPA adopted a non-geographic, adult age community standard for judging the prurience and offensiveness prongs of the Harmful To Minors test. As stated in the COMMITTEE REPORT at 28: [emphasis added herein, not in original Brief]

> The Committee recognizes that the applicability of community standards in the context of the Web is controversial, but understands it as an "adult" standard, rather than a "geographic" standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors.

The Court of Appeals below, at 178, failed to follow established First Amendment obscenity jurisprudence in its conclusions that (1) geographic standards would be inherently unconstitutional in cyberspace, that (2) obscenity and harmful to minors laws must be inherently applied by geographic standards, and that (3) COPA thus cannot be narrowed to avoid this perceived unconstitutionality even by following the intent of Congress to customize a new Web-specific test for "harmful to minors" that is American adult-age based, rather than geographic based.

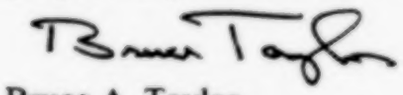
This Court should also correct this fundamental error for the additional reason that such an interpretation of community standards as exclusively territorial would or could be applied erroneously by federal and state courts to the application of adult obscenity laws to Internet or Web cases, despite this Court's recognition in *Jenkins v. Georgia*, 418 U.S. 87, 157 (1974), that geographic standards are not required for testing obscenity and in *Reno v. ACLU*, at 878, n. 44, that "Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles."

CONCLUSION

We submit the Congressional Committee Report was right and the Third Circuit was wrong on this critical issue and this Court should grant the Petition and correct this error.

Dated: April 16, 2001

Respectfully submitted,



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CERTIFICATE OF SERVICE

Three copies of this Brief Amicus Curiae were served upon the attorneys for the parties by deposit in the U.S. Mails, first-class postage prepaid, on the 16th day of April, 2001, addressed to:

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All parties required to be served have been served.

So certified,

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